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No. 08-1266

FILED

JUL 16 2009

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ISABEL GUERRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**PETITIONER REPLY TO
BRIEF IN OPPOSITION**

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July 16, 2009

QUESTIONS PRESENTED FOR REVIEW

- I. Whether a criminal defendant should be severely and unconstitutionally penalized with a forfeiture order that had been vacated by the district court and not reinstated until after the defendant had filed her brief on appeal with the 11th Circuit Court of Appeals?
- II. Whether the ruling from the 11th Circuit Court of Appeals sustaining the illegal forfeiture because “it had not been appealed” was arbitrary and capricious and in conflict with its own rulings on the effect a vacatur has on a criminal sentence once the original order of forfeiture has been vacated?
- III. Whether the criminal forfeiture order entered is constitutionally defective since criminal forfeitures have been held to be a fine subject to application of the eighth amendment’s excessive fines clause and whether the question of whether a fine is constitutionally excessive is subject to de novo review. U.S. Const., Amend. 8; *United States v. Bajakajian*, 524 u.s. 321, 336 n. 10 (1998), citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996) and *Alexander v. United States*, 509 U.S. 544 (1993); and *Austin v. United States*, 509 U.S. 602 (1993).

LIST OF INTERESTED PARTIES
CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Defendant-Appellant hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

| | | |
|-----------------------------|---|---------------------------|
| Trial Attorney | : | AUSA Luis M. Perez |
| Trial Attorney | : | AUSA Luis M. Perez |
| Petitioner | : | Isabel Guerra |
| Appellate Attorney | : | AUSA Anne R. Schultz |
| Magistrate Judge | : | Honorable Ted E. Bandstra |
| District Court Judge | : | Honorable Paul C. Huck |
| Attorney for Petitioner | : | J. C. Codias, Esq. |
| Acting Solicitor General | : | Edwin S. Kneedler |

This case is a criminal case and there are no parent companies or nonwholly owned subsidiaries.

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CITATIONS OF THE OFFICIAL AND
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THE CASE BY THE LOWER COURTS

Indictment against Petitioner Isabel Guerra.

Judgement of Conviction dated August 29, 2005.

Notice of Appeal from the conviction, sentence and order of forfeiture dated September 8, 2005.

Order of forfeiture by the district court dated November 16, 2005.

Order sua sponte vacating the final order of forfeiture by the district court dated November 30, 2005.

Appeal Number 05-14864-A filed December 30, 2005.

Final order of forfeiture by the district court dated February 7, 2006 after appeal had been filed.

Ruling from 11th Circuit of May 11, 2007 vacating the entire sentence and remanding for re-sentence.

Amended Judgement of Conviction (new sentence) dated February 20, 2008.

Notice of Appeal from this new sentence and order of forfeiture dated February 25, 2008.

Ruling on appeal by 11th Circuit from this second appeal dated January 9, 2009.

Order staying mandate pending ruling from this Honorable Supreme Court dated February 9, 2009.

Order denying Petition for Rehearing en Banc of March 16, 2009.

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ISABEL GUERRA,

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UNITED STATES OF AMERICA,

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**On Petition for a Writ of Certiorari to the
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**PETITIONER REPLY TO
BRIEF IN OPPOSITION**

GROUND FOR JURISDICTION

This matter was originally decided by a federal jury on June 29, 2005, who found Petitioner guilty on all counts in the indictment and was sentenced on August 25, 2005. The sentence, conviction and order of forfeiture was then appealed to the United States Court of Appeals for the Eleventh Circuit, whom vacated the sentence imposed on Petitioner on May 11, 2007 and remanded the case for re-sentencing.

Petitioner was re-sentenced on February 13, 2008 and the sentence, conviction and order of forfeiture,

was then appealed to the United States Court of Appeals for the Eleventh Circuit. The 11th Circuit ruled on this appeal on January 9, 2009 and a Petition for Rehearing In Banc was timely filed, and treating the Petition as a petition for rehearing by the panel, same was denied on March 16, 2009.

The mandate of this ruling has been stayed pending ruling from this Honorable Court on this Petition for Writ of Certiorari. Jurisdiction in this Honorable Court lies pursuant to 28 USC §1254.

STATUTORY PROVISIONS INVOLVED

This is an action involving Title 18 USC Sections 2; 371; 1347; 1956; and 982; Title 31 §§5324(a)(3) and §5317 and Title 42§1320a-7b(b). The pertinent texts are set forth in the appendix.

REPLY BRIEF OF PETITIONER TO GOVERNMENT'S BRIEF IN OPPOSITION

Comes now Petitioner Isabel Guerra and respectfully replies to the government's brief in opposition.

On page 1 the government admits that after the vacatur of the original sentence and order of forfeiture by the court of Appeals the district court entered a new and different sentence and a new and different order of forfeiture. The government admits this is a de-novo proceeding *but is silent as to the effect of a vacatur of a criminal sentence.*

The government is also silent as to the cases by the 11th Circuit Court of Appeals and by this Honorable Supreme Court defining the effect of a vacatur of a criminal sentence.

A criminal sentence is a package of sanctions which may or may not include forfeiture. The vacatur of

May 11, 2007 rendered the forfeiture order of August 25, 2005 invalid since this forfeiture order was part of the criminal sentence imposed on Isabel Guerra on August 25, 2005.

The new order of forfeiture entered on February 13, 2008 was part of a new sentence and was timely and fully appealed by Ms. Guerra to the 11th Circuit on Appeal 08-10873 since this subsequent order had not been vacated by the district court.

De-Novo. Forfeiture is a component of a criminal sentence. (United States Sentencing Guidelines §5E1.4). See also 18 U.S.C. §§3554; 1962; 1963; 3681; 3682; and 21 U.S.C. §853.

In *U.S. v. Tamayo*, 80 F.3d 1514, at 1520 (C.A.11 Fla. 1996) the 11th Circuit explained, that under this holistic approach, when a criminal sentence is vacated, *it becomes void in its entirety*; the sentence—including any enhancements—has “been wholly nullified and the slate wiped clean.” *Id.*; *U.S. v. Grant*, 397 F.3d 1330, at 1336 (C.A.11 Ga. 2005) (The law of this circuit, as well as that of six other circuits is, as a general matter, that when a sentence is remanded on appeal, the sentencing process commences again *de novo*); *Hall v. Moore*, 253 F.3d 624, at 628 (C.A.11 Fla. 2001); *U.S. v. Ramos*, 130 Fed.Appx. 415 (C.A.11 Fla. 2005)(The district court was permitted to consider the objections on remand because they were timely and because the sentencing process had started anew).

This Honorable Supreme Court has ruled on the effect a *vacatur* has on a criminal sentence in *North Carolina v. Pearce*, 395 U.S. 711, 721, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969).

The 11th Circuit in *U.S. v. Oliver*, 941 F.Supp. 1109, at 1118 (M.D. Ala. 1996) stated that upon a successful collateral attack, a district court "... shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255.

In this case the 11th Circuit simply ignored all its precedent case law and ruled in violation of its own previous rulings.

On item 1 on page 2 the government asserts Ms. Guerra had a "50% interest two companies-Ocean Medical and United Pharmacy". This is in error. Ms. Guerra was the sole owner of Ocean Medical since 1995 and there was no evidence of any health care fraud whatsoever in relation to Ocean Medical.

On or about April 23, 2003, a civil case was started by the government by requesting a temporary restraining order and injunction against all the real and personal assets of Isabel Guerra, her mother Mrs. Isabel Santos, and her employee Isabel Canepa.

The caption for the civil case was *United States v. Brickell Orthopedics, et al.*, with Case No: 03-21059-Civ-Jordan/Brown. Isabel Guerra's sworn deposition in the civil case was taken on July 23, 2004. This deposition was filed by in the subsequent criminal case. (R.doc. #205)

The indictment. Isabel Guerra was indicted on or about February, 2005. Upon learning that an indictment had been returned against her, she voluntarily surrendered to the FBI offices on Friday, February 25, 2005.

It was clear from the indictment that to offer and pay remuneration to induce Medicare beneficiaries to become legitimate patients of Ocean Medical and of her 50% portion of United Pharmacy was a separate and different violation than that of health care fraud (42 USC 1320 6(b)(1)(2) and not 18 USC §1347) The 11th Circuit Court of Appeals chose not to rule on this issue.

The 19 Medicare Fraud Counts. Isabel Guerra was charged with 19 identifiable charges of Medicare fraud. Four of these counts were dismissed by the trial court and the surviving 15 health care fraud counts in the indictment amounted to \$15,820.

The six (6) counts imputed to Isabel Guerra at Ocean Medical, namely, counts 2, 4, 7, 12, 15, and 16, were all prescriptions from a Dr. Pedro Cuni. The total amount of the six (6) Ocean Medical counts was \$7,000. ®. doc. #229 p.9) The sought forfeiture was based on these "health care fraud" counts.

Witness FBI S/A Wendy Evans indicated that Ocean Medical was servicing or had serviced 478 Medicare beneficiaries; (R.doc.#162 p.38) that Ocean Medical had been in business since 1995 but she had no evidence of any Medicare fraud during all these years.

On page 2 the government asserts that Ms. Guerra received referral fees from a pharmacy by sending her patients from Ocean Medical for service of their prescriptions. This dubious allegation was based on a jail house witness named Ruben Martinez, who pleaded guilty in an unrelated Medicare case used to own a pharmacy, and was convicted of health care fraud along with his entire family whom were all also convicted of health care fraud.

Martinez was trying to get sentence reductions for himself and his other family members for testifying at different trials. (R.doc.#157, pp.47-51)

Martinez also testified that everything at his pharmacy was legal except the aerosol medication, (R.doc.#156, p.33)and that he had a patient file for each patient serviced by his pharmacy (p.34).

Also, that the referred beneficiaries were all legitimate Medicare patients and the prescription was always dispensed as ordered by the patients' physician. (pp.42, 51) Martinez then stated that Ms. Guerra brought a few prescriptions to his pharmacy in the year 2000, and had received a commission from Martinez. (p. 41) However, Martinez was silent as to whether any of these alleged prescriptions were for aerosol medication.

When asked for the full name of Isabel Guerra, and to identify Isabel Guerra at trial, Martinez seemed confused. (R.doc.#156, pp. 45-47; doc.#157, p.27)

When asked to produce the *computer printout* of names of the alleged patients referred by Isabel Guerra to him in the year 2000, he stated that he did not have them. (pp. 55). When asked to produce the names of the alleged patients referred by Isabel Guerra for aerosol medication in the year 2000, *again* he stated that he did not have them. (p.57) Martinez acknowledged that every time a patient is serviced by a pharmacy that a patient chart is created by that pharmacy with all the information about the patient but when asked to produce such patient charts for the jury's review, the witness indicated that he could not bring them because all those patient charts were at the pharmacy. (R.doc.# 157, p. 21)

Martinez also testified he had an employee by the name of Cecilia Rodriguez, who actually worked at the pharmacy's computer, and whom later on opened her own pharmacy.(R.doc.#156, pp.43-44)

The government did not produce one single item of evidence about this allegation of Martinez, although supposedly in possession of all the records of Martinez's pharmacy.

Government witness Cecilia Rodriguez, worked for Ruben Martinez at his pharmacy, Lolita's pharmacy, since November 1997, and had known Martinez for about 25 years. Rodriguez was the pharmacy technician and in charge of inputting all the information into Martinez's pharmacy computers. She also personally knew all the many patient recruiters that Martinez had, because they would personally bring the prescriptions directly to her.

Rodriguez, who was testifying in exchange for possible favors from the government, did not once mention Isabel Guerra as ever having been a recruiter for Martinez's pharmacy; nor being in Lolita's pharmacy's computers; nor ever bringing one single aerosol prescription to her at Lolita's pharmacy; nor of her having any arrangement whatsoever with Isabel Guerra at Martinez's pharmacy.

Rodriguez acknowledged that all prescriptions were legitimate; from legitimate doctors, and that in every case the medication was actually dispensed to the Medicate patient. (R.doc. 157, pp129-131)

Not one single prescription was identified nor introduced into evidence as being the subject matter of any fraud whatsoever in reference to Isabel Guerra.

On page 4 the government admits the repeated efforts by Petitioner Guerra challenging the order of forfeiture stating that the original order of forfeiture of \$9.4 million was proper since it was based on the "loss" to Medicare caused by Ms. Guerra.

Post-trial proceedings.

When questioned by the district court, the government admitted it did not have one single case from the 11th Circuit Court of Appeals justifying the calculations of losses used in this case to sentence Isabel Guerra to incarceration, (R.doc. #229 p.25) also admitting that in this case the Medicare patients had received the prescribed items. (R.doc. 162, p.8)

When questioned by the district court the government acknowledged at trial that it could not tie one single specific claim submitted by Isabel Guerra to any specific fraud, except the general allegation that it was a "paid beneficiary". (R.doc.# 162, p.171, 172) Appeal No: 05-14864-A.

Sentence proceedings.

At sentence on August 25, 2005, the district court agreed with the testimony of CMS Medicare expert Tanya Moore that there was no evidence in this case that the Medicare program had suffered any losses and as such it could not order restitution. (R.doc. #229 pp. 4-7)

But then the district court reversed itself ruling that because of the "fraud" Isabel Guerra was being sentenced to 99 months in jail based on \$9,405,114.90 in "losses" to the Medicare program. (R.doc.# 230) A forfeiture order \$9,405,114.90 was also entered as part of the sentence.

On page 5 the government admits that the order of forfeiture in the criminal case was vacated sua sponte by the district court and as such there was no final order to appeal asserting that although Petitioner made some "passing references" in the statement of the facts of the brief on appeal, Petitioner "raised no legal challenges to the forfeiture order". Here the government suggests that a legal challenge should have been raised to a vacated non-existing order which would have constituted a frivolous and baseless appeal.

On page 6 the government admits that paying referral fees alone is not the same as having committed health care fraud. There simply was no evidence that Ms. Guerra ever paid any referral fees to any patient of either Ocean or United such being the reason the Court of Appeals ruled that the total amount of "fraud" based on the referral fees paid by Ms. Guerra was limited to \$11,800.

On page 7 the government indicates that at the new sentence Ms. Guerra was sentenced based on the \$698,551 Ms. Guerra had "laundered".

The government does not tell this Honorable Court that in the decision of *United States v. Isabel Guerra*, Appeal 08-10873, January 9, 2009, the 11th Circuit Court of Appeals clearly ruled where the government wanted to impute the total value of the checks issued by Ms. Guerra as "losses" to Medicare for sentencing purposes. On page 9 of the decision the 11th Circuit ruled as follows:

"Pursuant to §2B1.1, Guerra's base offense level was six. See U.S.S.G. §2B1.(a)(2). While the district court added 14 levels based on its finding that \$698,551 was the amount of money laundered, Guerra actually did not merit any additional levels from the

§2B1.1 loss table because she was not responsible for any loss to Medicare. *See Medina.* 485 F.3d. at 1304-05; U.S.S.G. §2B1.1(b)(1)."

"The commentary to this Guidelines includes no provision equating "loss" with the value of the laundered funds. *See generally* U.S.S.G. §2B1.1, comment."

On page 9 the government states that Petitioner does not contend that "the court of appeals decision conflicts with any decision of this Court or any other court of appeals". This is in error. Specifically Petitioner indicated in her petition that such ruling violated the 11th Circuit's own precedent as well as this Honorable Court's rulings as previously stated.

On page 9 the government admits that the preliminary order of forfeiture is final and appealable so it follows that if this final and appealable order is vacated there is no final and appealable order to appeal.

On page 11 and in support of its theory that preliminary order of forfeiture is final and appealable, the government relies on the *United States v. De Los Santos* case. 260 F.3d. 446 (5th Cir. 2002). This case is distinguishable from the instant case and as such inapplicable.

On page 14 the government asserts that the original order of forfeiture of \$9.4 million and the subsequent order of \$7.6 million is not grossly disproportionate to the gravity of the offense. The government is silent as to the fact that the Court of Appeals only found \$11,800 as losses as a result of the offense, and this not because Ms. Guerra had ever filed any false claims with Medicare but rather because she had paid referral fees in that amount.

On this same page the government asserts that whether Ms. Guerra ever caused any losses to Medicare is irrelevant. That she should be liable for the entire forfeiture anyway because she obtained the monies "fraudulently. But this is contrary to the order from the 11th Circuit Court of Appeals.

If Ms. Guerra never caused any losses to Medicare why should she be ordered to forfeit \$7.6 million? Is this to make the victim Medicare whole? The alleged victim in this case (Medicare) never suffered any losses.

This Supreme Court then held that the forfeiture would violate the Clause if it were grossly disproportional to the gravity of the defendants' offense (as this Court concluded was the case in *Bajakajian*). *Bajakajian*, at 334.

Where, as here, the funds and property seized were obtained in the course of operating a legitimate business, which caused no losses (to Medicare, or to the patients), it is plainly necessary under *Bajakajian* to apply the excessiveness test to the \$7.6 million forfeiture order.

On page 15 the government repeats that the \$7.6 million order represents the gross amount received by Ms. Guerra from Medicare for providing legitimate services to Medicare patients for a number of years thereby repeating the government's argument in the district court when seeking the initial and subsequent forfeiture orders of forfeiture which arguments have already been rejected by the Court of Appeals.

Since there is no legal nor factual basis justifying either the original order of forfeiture nor the second order of forfeiture the government then recurs to a selective quotation by counsel for Ms. Guerra to the

effect that there is no way to prove or disprove a proffer made by the government as to the amounts proffered representing the total of all claims filed by a provider over several years of billing. This is a selective quote from a much larger sentence proceeding.

This simply means that the amounts proffered by the government are based on private internal computer printouts from government agencies which are provided to the government by the agencies and bear no resemblance whatsoever to the substantive counts in the indictment and defense counsel has no way to verify each of the tens of thousands of individual claims, some of which may be several years in the past.

The real position of Ms. Guerra at re-sentence was filed *in writing* with the district court prior to the sentence hearing.

On May 21, 2007 Ms. Guerra filed her position at re-sentence indicating, *inter alia*,

"It is respectfully requested that the orders of forfeiture entered by this Honorable Court on January 11, 2006, and February 7, 2006, based on \$9,405,114.90 in losses to the Medicare program be vacated."(D.E.# 451).

SUMMARY OF THE ARGUMENT

Ms. Guerra never waived her forfeiture argument. The new order of forfeiture imposed as part of the new criminal sentence on February 13, 2008 was timely appealed. The previous order of forfeiture of August 25, 2005 was vacated in its entirety when the sentence was vacated and the case remanded for re-sentence.

CONCLUSION

The order of forfeiture of \$7,600,000 should be vacated and replaced with an order of forfeiture reflecting the \$11,820 affirmed by the 11th Circuit Court of Appeals.

WHEREFORE: Petitioner Isabel Guerra respectfully prays this Honorable court grant her Petition For Writ of Certiorari.

Respectfully submitted,

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